No. 05-18-00941-CR

In the Court of Appeals
for the Fifth District of Texas
at Dallas

ANTHONY RASHAD GEORGE,
APPELLANT

v.

THE STATE OF TEXAS,
APPELLEE

On appeal from the 282nd Judicial District Court of Dallas County, Texas
Trial Cause No. F16-76714-S

STATE'S BRIEF

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The State requests oral argument only if Appellant argues.

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STATEMENT OF THE CASE

Appellant, Anthony Rashad George, pleaded not guilty before a jury to the charged offense of capital murder. (CR: 10, 140; RR7: 243); Tex. Penal Code Ann. § 19.03(a)(2). On July 27, 2018, the jury found Appellant guilty as charged and the trial court assessed the mandatory sentence of life imprisonment without parole. (CR: 9, 140, 157; RR10: 296-298); Tex. Penal Code Ann. § 12.31(a)(2). Appellant now claims on appeal that the evidence is legally insufficient to prove his guilt as a principal or party to capital murder, that the trial court erred by denying his request for a jury instruction on the lesser-included offense of robbery, and that the trial court erred by denying his motion for mistrial and overruling his objection to two instances of improper jury argument.

STATEMENT OF FACTS

On November 27, 2016, Brian Sample was robbed and murdered in his hotel room at the Le Meridien Hotel in Dallas County, Texas. (RR7: 254-255, 273; RR8: 14, 19, 39). Brian's body was discovered by housekeeping around 5:30 p.m. hunched over the hotel bed, unclothed, and bound at the wrists and ankles with zip ties. (RR7: 279; RR8: 16, 48, 188; RR10: 56). The television was at full volume and the room was in disarray. (RR7: 276, 279; RR8: 16, 91; RR10: 56). Footage from the hotel's security cameras reflected that Brian was last seen alive around 2:15 p.m. the day of the offense in the lobby and elevator area of the hotel. (RR8: 77, 229-33). He was with

two females, later identified as escorts Jessica Ontiveros and Rachel Burden. (RR8: 72-73, 77, 229-33).

The Dallas County Medical Examiner's Office performed an autopsy the day after the offense, on November 28, 2016. (RR8: 129, 137, 149; State's Exhibit 87). The autopsy revealed that Brian had numerous injuries on his body consistent with blunt force trauma. (RR8: 144-45, 149, 193). Specifically, he had multiple abrasions on his skin; multiple contusions on his head, face, and upper and lower extremities; one fractured tooth; and a skull fracture underneath the deepest cut on the left side of his forehead. (RR8: 144-45, 147-52, 153-68). He also had pinpoint hemorrhages, called petechiae, on the neck, chest, and eyes, which are injuries consistent with asphyxiation. (RR8: 159-60). The medical examiner concluded that Brian died as a result of homicidal violence, including asphyxia and blunt force injuries, and that the manner of death was homicide. (RR8: 175, 178).

Three or four days prior to the murder, Brian had received a large insurance settlement check. (RR7: 250-51). There was a safe mounted to the cabinet inside the closet of Brian's hotel room. (RR10: 73). When hotel staff assisted the officers in opening the safe, they found $17,700 in cash inside. (RR10: 73-74).

Jessica Ontiveros, one of the females seen on hotel security footage with Brian shortly before his death, testified that she met Appellant, Anthony George, when she was twenty years old while she was working as a stripper and an escort in Dallas. (RR8: 204, 206, 269). Jessica and Appellant began dating and she moved in with

Appellant a few months later. (RR8: 205). She continued to work as an escort while she was dating Appellant, and he would occasionally drive her to meet her dates. (RR8: 207). Jessica gave all the money she made to Appellant and he paid the bills. (RR8: 208, 251). Jessica met fellow escort Rachel Burden, who went by the name "Cali," through Appellant. (RR8: 208-09).

Rachel Burden was working as an escort in Atlanta, Georgia when she met Appellant through the social media website Instagram. (RR9: 84-85, 87). In October 2016, after communicating with Appellant on Instagram for almost a year, Rachel decided to come to Dallas to work with Appellant as her pimp. (RR9: 86-88). Rachel had been victimized by two clients who tied her up and sexually assaulted her, so she desired the protection that Appellant promised her. (RR9: 87-88). Appellant bought Rachel's bus ticket to Dallas, picked her up from the bus station in his Dodge Challenger upon her arrival, and arranged for her to stay in a hotel. (RR9: 89-90). He also bought her a new cell phone to use for her business. (RR9: 95). Appellant, whom she referred to as "Papi" or "Daddy," assisted Rachel in finding clients by posting ads for her services online. (RR9: 92-93, 94-95, 96). Rachel would then screen the potential clients before setting up an appointment. (RR9: 93, 94-95, 96). Rachel did "in calls" at her hotel where the client came to her, as well as "out calls" where she went to the client's location. (RR9: 96-97). Because Rachel did not have a car, Appellant would drive her to her dates or arrange a ride for her through Uber. (RR9: 97).

Rachel knew that Appellant had another girl – Jessica Ontiveros – working for him as well. (RR9: 92). Like Jessica, Rachel gave Appellant all the money she made. (RR9: 92, 98). Occasionally, Appellant would search Rachel's belongings to make sure she was not hiding any money from him. (RR9: 98-99). After Rachel had been working in Dallas a few weeks, she and Jessica became friendly and communicated with each other on social media websites and via text message. (RR8: 209; RR9: 92-93). Occasionally they would do dates together because it generated more money. (RR9: 100-01).

Jessica met Brian Sample online and, the morning of the offense, scheduled an appointment with him at the Le Meridien Hotel. (RR8: 209-12, 271). When Jessica arrived at Brian's hotel room, it appeared to her that Brian was intoxicated. (RR8: 210, 212-13). After Jessica had been at the appointment for a short time, Brian requested an additional girl, so she called Rachel. (RR8: 211, 274-76; RR9: 100-01). Appellant picked up Rachel and took her to the hotel to join Jessica and Brian. (RR9: 100-01). Brian and Jessica met Rachel downstairs, and then the three of them went up to the room together. (RR8: 213; RR9: 101-02). Rachel and Jessica did some drugs with Brian and spent a little over an hour with him. (RR8: 212, 277; RR9: 103, 105-06). Brian offered to let Rachel have his hotel room later that evening, so they exchanged numbers before she left. (RR9: 104). At the conclusion of the date, Jessica went to another appointment and Appellant picked up Rachel from the hotel. (RR8: 213; RR9:

104). During the drive, Rachel told Appellant that Brian had paid them in all $100 bills that he retrieved from the closet. (RR9: 102-03, 106).

A short time later, Brian sent Rachel a text asking if she and Jessica could come back. (RR8: 213-14, 280; RR9: 106-07, 111). Jessica was on another date, so Rachel planned to go alone until Jessica could join them. (RR8: 213-14, 280; RR9: 111-12). Appellant drove Rachel back to the hotel to meet Brian. (RR9: 112). Brian and Rachel got high and talked while they waited for Jessica to arrive. (RR9: 113). Once Jessica notified Rachel she was on her way in an Uber, Brian and Rachel met her downstairs and then the three of them went back up to the room together. (RR8: 214; RR9: 115). During this second date, Brian was intoxicated, but Rachel thought he was "manageable." (RR9: 116). At the end of the date, Brian gave Rachel his room key so she could come back later to use the room after he had left the hotel. (RR9: 117). Appellant picked up both girls and they drove to his and Jessica's apartment. (RR9: 117-18). During the drive, Rachel told Jessica and Appellant that Brian had more money and they should go back. (RR8: 235, 243).

Brian contacted Rachel again a short time later and requested that she and Jessica come back for a third date. (RR9: 119). Jessica and Rachel met Brian downstairs and the three of them went up to his room together. (RR9: 120). During the third date, Brian was acting even more erratic and paranoid than before. (RR8: 215, 281; RR9: 120, 183). He told Jessica and Rachel to stop talking to each other and to stop touching their phones. (RR9: 120). He also moved a piece of furniture in front

of the door to prevent them from leaving or anyone else coming in. (RR8: 215-16, 282; RR9: 120). Rachel told Brian she needed to make a call and had him remove the barrier from the door so she could step out. (RR8: 216, 281; RR9: 120-21, 186-87).

As Rachel was leaving, Appellant was entering the hotel to execute their plan to rob Brian. (RR8: 121; RR9: 150, 183; RR10: 40). Appellant had changed into all black clothing and was wearing gloves. (RR8: 79; RR9: 133, 144-45). He was accompanied by his friend Rodney Range, who was dressed in red. (RR8: 79; RR10: 82). Rachel met up with Appellant outside the hotel and, after she gave him the money she had made from the date, he instructed her to walk up the street. (RR8: 82; RR9: 121). She complied and then sent Appellant a text message warning him to "be careful." (RR9: 122, 146, 148, 150; RR10: 40). She then texted Jessica to let her know that Appellant and Range were coming up to the room. (RR8: 220). She also suggested to Jessica and Appellant that they look for money in the closet and that they take the phone cords from the room so that Brian could not call anyone for help. (RR9: 122, 148; RR10: 41).

A few minutes later, Appellant and Range entered Brian's hotel room wearing black gloves. (RR8: 217, 244, 257). Appellant directed Jessica to sit on the couch. (RR8: 241-43). Brian yelled at the intruders and they all started fighting. (RR8: 217, 242). Range and Appellant hit and kicked Brian all over his body. (RR8: 217, 242, 244-45, 255-56, 258-59). Brian fought back, and it took the strength of both Range and Appellant to get Brian under control and wrestle him onto the bed. (RR8: 236, 244).

Range put Brian in a chokehold until he went unconscious, and then he bound his wrists and ankles with zip ties. (RR8: 218, 284). As a result of the struggle, Brian's blood was all over the hotel room. (RR8: 244, 247). Brian was lying face-down on the bed in a pool of blood, unconscious, as the men searched the room. (RR8: 218, 220-222). Range told Appellant they needed to locate Brian's license because he thought Brian's birthdate might be the code to open the safe mounted inside the closet. (RR8: 221). Range located and searched through Brian's wallet, but ultimately they were unable to open the safe. (RR8: 250). After Appellant and Range had tossed the entire room and taken Brian's watch and cell phone, they left. (RR8: 221-22). Appellant ordered Jessica to stay in the room a short time before she left. (RR8: 222).

Rachel met up with Appellant and Range as they exited the hotel. (RR8: 83; RR9: 124, 146). Rachel did not know Range, but noticed that he was wearing all red clothing. (RR9: 125). As Rachel and Appellant walked on the east side of the hotel toward Appellant's car, Appellant tossed Brian's cell phone in the sewer drain. (RR10: 74, 77). Once they got into Appellant's car, Rachel noticed that Appellant had blood on his face. (RR9: 125-26; RR10: 42). Appellant did not appear to have any injuries. (RR10: 42). At this moment, Rachel suspected it was Brian's blood and that something had gone wrong during the robbery. (RR9: 151; RR10: 42).

Jessica exited the hotel about ten minutes later and got into the car with Appellant and Rachel. (RR8: 223). When she left the room, Brian was still lying face-down on the bed, unconscious. (RR8: 222). Jessica told Rachel that she had put the

cups they drank out of in the bathtub so their DNA would not be on them. (RR9: 126). The three of them drove to Appellant's and Jessica's apartment, and Range came over a short time later. (RR9: 127). Rachel and Jessica went upstairs to get high; however, Rachel could hear Appellant and Range downstairs talking about the watch they had taken from Brian and debating whether it was real. (RR9: 127-28).

A few days after the offense, Appellant told Rachel they were going to Las Vegas. (RR9: 129). Once they arrived, Appellant took Rachel's old cell phone and gave her a new one. (RR9: 132-33). Rachel stayed at a motel that Appellant paid for, and Appellant stayed at the residence of a man named Jarvis Heard. (RR8: 226, 294, 299-300; RR9: 129). Jessica, who had been recovering from surgery in Dallas, came to Las Vegas about a week later and stayed with Appellant at Heard's residence. (RR8: 225-26, 294, 300-01; RR9: 129).

Dallas Police Detective Derick Chaney was the lead detective assigned to investigate Brian's murder. (RR10: 54). When he arrived at the crime scene, it was apparent to him that there had been a physical altercation in Brian's hotel room and that the room had been tossed. (RR10: 59-60). The blood spatter on the headboard, wall, and pillows was consistent with the victim being hit multiple times while bleeding. (RR10: 61-62). Brian's ankles and wrists were bound tightly and in such a way that he could not have done it himself. (RR10: 62-63). The safe in Brian's hotel room was mounted to the cabinet inside the closet, so it was not something that a robber could grab and take with them. (RR10: 73).

Officers recovered latent prints inside the hotel room, which were processed and identified as the prints of Jessica Ontiveros and Rachel Burden. (RR10: 93). The officers also reviewed the footage from the hotel's security cameras, which showed the following timeline of events the day of the offense:

11:41 a.m.-Camera 05	Gray Dodge Charger driving up to hotel. (RR10: 80; SE 159).
11:43 a.m.-Camera 08	Brunette female, identified as Rachel Burden, on her cell phone inside the hotel. (RR10: 80; SE 160-161).
12:00 p.m.-Camera 04	Black male, identified as Appellant, outside the hotel wearing a white shirt, jacket, and slides. (RR10: 80; SE 162-163).
12:44 p.m.-Camera 04	Appellant and Rachel outside the hotel together. (RR8: 227; RR10: 80; SE 164).
12:44 p.m.-Camera 03 12:45 p.m.-Camera 04	Blonde female, identified as Jessica Ontiveros, outside the hotel. (RR8: 228; RR10: 81; SE 165-166).
1:09 p.m.-Camera 04	Jessica and Rachel together outside the hotel. (RR8: 229; RR10: 81; SE 167).
1:09 p.m.-Camera 05	Jessica and Rachel getting into Appellant's gray Dodge Charger parked on the east side of the hotel. (RR10: 81; SE 168).
1:09 p.m.-Camera 05	Appellant's gray Dodge Charger leaving hotel. (RR10: 82; SE 169-170).
2:10 p.m.	Appellant's gray Dodge Charger driving up to hotel. (RR8: 229).

2:11 p.m.-Camera 04	Rachel and Jessica together outside the hotel. (RR8: 77, 229, 231; RR10: 82; SE 171).
2:13 p.m.-Camera 09	Brian at the hotel's front counter, wearing his watch. (RR10: 82; SE 172).
2:16 p.m.-Camera 07 2:16 p.m.-Camera 08	Jessica and Rachel in the hallway where the hotel elevators are located. (RR8: 231; SE 173-175).
2:17 p.m.-Camera 07 2:17 p.m.-Camera 08	Jessica and Rachel with Brian in the hallway where the hotel elevators are located. (RR8: 77, 231; RR10: 82; SE 176-178).
2:46 p.m.-Camera 05	Appellant's gray Dodge Charger driving up outside the hotel. (SE 179).
2:48 p.m.-Camera 05	Two black males wearing hoodies walk toward the hotel. (RR8: 59, 79; RR10: 82; SE 180, 183). Male in black identified as Appellant. Male in red identified as Range.
2:48 p.m.-Camera 03	Appellant and Range about to enter the hotel. (RR8: 80; SE 184).
2:49 p.m.-Camera 07	Appellant and Range waiting near elevators. (RR8: 60-61, 80; RR10: 83; SE 186-189). Appellant uses his elbow to press the elevator button. (RR10: 85).
2:50 p.m.-Camera 05	Appellant walks outside the hotel toward car parked on Petersen, then back to hotel. (RR8: 80-82; SE 185, 190).
2:51p.m.-Camera 08	Appellant near hotel elevators. (RR10: 83; SE 191-193).
2:53 p.m.-Camera 07	Rachel near hotel elevators on her cell phone. (SE 194-195).

2:54 p.m.-Camera 03	Rachel outside the hotel. (SE 196).
2:54 p.m.-Camera 05	Appellant outside the hotel. (SE 197-198).
2:54 p.m.-Camera 04	Rachel and Appellant outside the hotel. (RR8: 81-82; RR10: 83; SE 199).
2:55 p.m.-Camera 03	Rachel outside the hotel with Appellant, who is about to go inside. (RR8: 82-83; RR10: 86; SE 200).
2:55 p.m.-Camera 08	Appellant inside the hotel near the elevators. (RR10: 87). Appellant uses his elbow to press the elevator button. (RR10: 87).
2:56 p.m.-Camera 08	Appellant entering the elevator. (RR10: 87).
3:13 p.m.-Camera 04	Appellant and Range leaving the hotel. (RR8: 83; RR10: 77, 83; SE 201).
3:14 p.m.-Camera 05	Appellant and Range walking away from hotel toward Petersen. Rachel is also seen walking ahead of them. (SE 202-204). Appellant is seen on video throwing something in the sewer drain on the east side of the building. (RR10: 77).

After reviewing the footage, officers searched the sewer drain on the east side of the hotel and located Brian's cell phone inside. (RR10: 74, 76-77). From the footage and physical evidence, the officers identified four suspects that were wanted in connection with the capital murder of Brian Sample – Jessica Ontiveros, Rachel Burden, Appellant, and another unknown black male, later identified as Rodney Range.

Detective Chaney contacted the U.S. Marshal Fugitive Task Force[1] to assist him in locating the suspects. The task force tracked Jessica's cell phone location to the home of Jarvis Heard in Las Vegas and then set up surveillance on Heard's residence. (RR9: 19-20; RR10: 92). On December 6, 2016, Appellant was seen in the driveway of the residence (RR9: 23, 54-57, 65, 71). Appellant and Jessica were arrested two days later, on December 8, 2016, when officers executed a search warrant at Heard's residence. (RR8: 226, 303; RR9: 17, 27, 35, 42, 53). During a search of the residence, officers seized two cell phones from the bedroom upstairs that Jessica identified as the bedroom where she and Appellant were staying. (RR9: 30-34, 59, 68-69; State's Exhibits 134, 135). One phone was identified as Jessica's cell phone associated with the number 903-246-6054. (RR9: 30-31, 63-64). Rachel was arrested later the same day at an extended-stay motel in Las Vegas. (RR9: 35-37, 67). When Jessica was interviewed regarding the offense, she told the police that they would find Brian's watch in a jewelry box in Appellant's closet at their apartment. (RR8: 254-55).

SUMMARY OF THE ARGUMENT

***Response to Issue One*:** The testimony showed that Appellant participated in hitting and kicking Brian and lying Brian face down in a pool of his own blood after he had lost consciousness – all actions which led to Brian's death. Even if the jury

[1] The U.S. Marshal Fugitive Task Force assists law enforcement in locating and apprehending fugitives who are wanted for outstanding felony crimes in various jurisdictions throughout the country. (RR9: 18-19, 54, 66).

disbelieved any of the evidence proving Appellant's guilt as a principal, there was still ample evidence proving his guilt as a party. The evidence showed that Appellant planned, directed and aided all of the individuals who participated in the offense. Moreover, Appellant was part of a conspiracy to commit robbery and the murder of Brian Sample was committed in furtherance of the robbery and should have been anticipated. Therefore, the evidence is sufficient to support Appellant's conviction for capital murder as a principal, party, or party-conspirator.

***Response to Issue Two*:** Because Appellant was charged with a conspiracy theory of liability for murder in the course of a robbery, Appellant is entitled to a lesser-included offense instruction on robbery only if there is evidence in the record showing either there was no murder, the murder was not committed in furtherance of a conspiracy, or the murder should not have been anticipated. Appellant wholly fails to make this showing. As such, the trial court properly denied his request for a jury instruction on the lesser-included offense of robbery.

Response to Issues Three and Four: The trial court acted within its discretion in overruling Appellant's motion for mistrial and objection during closing argument. Both of the complained-of arguments were proper summations and reasonable deductions from the evidence, and it is clear from the context of each argument that the prosecutor did not have an improper motive. Moreover, error, if any, was harmless.

Response to Issue Five: The State agrees that the judgment should be reformed to correct the errors identified by Appellant.

State's Cross-Point: The judgment should be modified to reflect and affirmative finding of a deadly weapon.

ARGUMENT

RESPONSE TO ISSUE ONE

The evidence is legally sufficient to support Appellant's conviction for capital murder as a principal or a party.

In his first issue, Appellant contends that the evidence is legally insufficient to sustain his capital murder conviction because the State failed to present evidence that he intentionally or knowingly caused the victim's death or should have anticipated that his accomplice would murder the victim during the course of the robbery. (*See* Appellant's Br. at 14).

Standard of Review

Due process requires that the State prove, beyond a reasonable doubt, every element of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 313 (1979). In reviewing a challenge to the sufficiency of the evidence, appellate courts examine all of the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Id.* at 319; *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). This standard accounts for the factfinder's duty to resolve conflicts in the

testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jackson*, 443 U.S. at 319. An appellate court cannot act as a thirteenth juror and make its own assessment of the evidence. *Nisbett v. State*, 552 S.W.3d 244, 262 (Tex. Crim. App. 2018). A court's role on appeal is restricted to guarding against the rare occurrence when the factfinder does not act rationally. *Id.*

It is not necessary that the evidence directly prove the defendant's guilt. *Id.* Circumstantial evidence is as probative as direct evidence in establishing a defendant's guilt, and circumstantial evidence can alone be sufficient to establish guilt. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

A culpable mental state must generally be inferred from the circumstances surrounding the crime. *Nisbett*, 552 S.W.3d at 267. A reviewing court cannot read a defendant's mind and, absent a confession, it must infer his mental state from his "acts, words and conduct." *Id.* The culpable mental state for an offense may be inferred from a defendant's motive, his attempts to conceal evidence, implausible explanations to the police, and the extent of the victim's injuries. *Id.*

Applicable Law

The State was required to prove in this case that Appellant intentionally caused the death of Brian Sample in the course of committing or attempting to commit the offense of robbery. (CR: 10, 105-06, 151); Tex. Penal Code Ann. § 19.03(a)(2). The jury in this case was authorized to find Appellant guilty of capital murder as a

principal or as a party under section 7.02 of the Texas Penal Code. (CR: 147-48, 151-52).

Under Texas law, a person may be convicted as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both. Tex. Penal Code Ann. § 7.01(a). Section 7.02(a)(2) of the Texas Penal Code provides that a person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. Tex. Penal Code Ann. § 7.02(a)(2). Section 7.02(b) provides that if, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy. Tex. Penal Code Ann. § 7.02(b).

In determining whether the defendant participated as a party, the jury may consider events occurring before, during, and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act. *King v. State*, 29 S.W.3d 556, 564 (Tex. Crim. App. 2000); *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1996). Since an agreement between parties to act together in a common design can seldom be proved

by words, the State often must rely on the actions of the parties, shown by direct or circumstantial evidence, to establish an understanding or common design to commit the offense. *Miller v. State*, 83 S.W.3d 308, 314 (Tex. App.—Austin 2002, pet. ref'd). Circumstantial evidence may suffice to show the defendant is a party to the offense. *Ransom*, 920 S.W.2d at 302; *Miller*, 83 S.W.3d at 314.

Because the jury returned a general verdict in this case, Appellant's conviction must be upheld if the evidence is sufficient under either theory of party liability. *See Swearingen v. State*, 101 S.W.3d 89, 95 (Tex. Crim. App. 2003).

The Evidence is Sufficient to Support Appellant's Conviction for Capital Murder as a Principal or a Party

The evidence at trial showed that, after Rachel and Jessica told Appellant that they believed Brian had a large amount of cash stored in his hotel room, the three of them conspired to go back to Brian's hotel room and rob him. Rachel and Jessica warned Appellant that Brian was acting paranoid and erratic due to his use of illicit drugs, so Appellant recruited his friend Range to assist him in committing the robbery. Appellant's recruitment of Range showed that he knew there was some risk involved in executing their plan and demonstrated that he was prepared to use whatever force was necessary to complete the robbery.

When Appellant and Range entered Brian's hotel room, both men hit Brian repeatedly in the face and all over his body. The blood spatter in the room was consistent with Brian being hit repeatedly after he was bleeding. Both men fought to

subdue Brian and wrestle him onto the bed. They put Brian in a chokehold and, even after Brian went unconscious, the men laid him face-down on the bed and bound his wrists and ankles with zip ties to ensure that he could not escape or fight back if he regained consciousness. After Appellant and Range tossed the room, they did not check to see if Brian was conscious or needed medical attention. Instead, they ripped the hotel phone cord from the wall and also took Brian's cell phone with them to ensure that he could not call for help. Once they were outside the hotel, Appellant threw Brian's cell phone in a sewer drain to conceal the evidence. When Appellant met back up with Rachel, he had blood on his face, which was presumably Brian's because Appellant did not have any injuries of his own. A few days after the offense, Appellant, Rachel, and Jessica fled to Las Vegas to avoid apprehension. Appellant confiscated the cell phones Jessica and Rachel had previously used to communicate with Brian and gave them new phones.

The medical examiner testified that Brian had blunt force injuries all over his body and that one of these injuries on his head was so severe that it chipped his skull. Brian also had injuries consistent with asphyxiation, which could have been caused by a chokehold or by a pillow. The medical examiner concluded that Brian died as a result of homicidal violence, including asphyxia and blunt force injuries, and that the manner of death was homicide. Appellant's own girlfriend admitted during her testimony that Appellant participated in hitting and kicking Brian during the commission of the offense. Any one of Appellant's blows could have been the fatal

blow that ultimately led to Brian's death. Additionally, Appellant assisted in lying Brian face down in a pool of his own blood after he had lost consciousness. This, too, could have been the cause of Brian's asphyxiation and ultimate death. All of this evidence supports Appellant's guilt as a principal.

Even if the jury believed Appellant's defensive theory at trial that Range was the only one who used physical force against Brian during the course of the offense, the evidence is still sufficient to support Appellant's conviction for capital murder as a party. The evidence showed that the entire offense was planned by Appellant and that all of the other participants were acting at his direction. The jury could have reasonably inferred that Appellant recruited Range because he had planned for Range to kill Brian all along and that he went to the hotel that day with the intent to aid in the commission of capital murder. It is a reasonable inference from the evidence that Appellant had always planned for Range to murder Brian in order to facilitate stealing his money and belongings without fear of him retaliating or reporting them to authorities. *See* Tex. Penal Code Ann. § 7.02(a)(2).

Moreover, even assuming *arguendo* that Appellant had only planned to rob Brian and had not planned to kill him, the evidence is still sufficient to support Appellant's guilt as party-conspirator. The participants clearly conspired to commit robbery and in the course of carrying out their conspiracy to commit robbery, the force used by Appellant and/or Range resulted in Brian's death. All of the force used by Appellant and Range was in furtherance of the unlawful purpose. Appellant knew going in that

Brian was acting "crazy" and erratic due to his drug use, hence his recruitment of Range to assist him with the offense in the first place. At the least, Appellant should have anticipated that Brian would attempt to fight back or escape during the course of the robbery and, as a result, could be killed. Thus, Brian's death should have been anticipated as a result of carrying out the robbery. *See e.g., Whitmire v. State*, 183 S.W.3d 522, 526–27 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) (evidence sufficient to show the defendant should have anticipated the murder in the course of the aggravated robbery and, thus, sufficient to support his conviction for capital murder where defendant planned to rob the victim and recruited two other armed men to assist, defendant did not attempt to stop the confrontation, made no attempt to render aid to the victim after the shooting, and did not report the crime by his co-conspirator).

Appellant's guilt can also be inferred from his conduct before, during, and after the offense. *See King*, 29 S.W.3d at 564; *Ransom*, 920 S.W.2d at 302 (in determining whether the defendant participated as a party, the jury may consider events occurring before, during, and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act). When Appellant arrived at the hotel, he parked off site, which was unlike the previous times he had visited the hotel. He had changed into all black clothing, and both he and Range were wearing hoodies to hide their faces. The security footage showed that Appellant pressed the elevator buttons with his elbow, rather than his

hand, to avoid leaving any fingerprints or DNA. When Appellant and Range entered the hotel room, both men were wearing gloves and were clearly ready to engage in whatever force was necessary to execute the robbery. They even turned up the volume on the television to muffle the sound of any scuffle in the room.

After the offense, Appellant did not call the police to report a robbery that had gone farther than anticipated. *See, e.g., Lee v. State*, 866 S.W.2d 298, 302 (Tex. App.—Fort Worth 1993, pet. ref'd) (a defendant's failure to contact the police may be relevant to the question of his consciousness of guilt, or lack thereof, and his overall mental state). Rather, as he was leaving the hotel, he discarded Brian's cell phone in a sewer drain outside the hotel so that this evidence would not be found by law enforcement. A jury may consider a defendant's attempt to destroy or conceal evidence as evidence of his culpable mental state. *See Nisbett*, 552 S.W.3d at 267.

Appellant then fled with his co-conspirators, Rachel and Jessica, to Las Vegas to avoid apprehension. Flight reflects consciousness of guilt. *Clayton*, 235 S.W.3d at 780 (noting that a "fact finder may draw an inference of guilt from the circumstance of flight"). Flight is also a circumstance from which an intent to kill can be inferred. *See Wilkerson v. State*, 881 S.W.2d 321, 324 (Tex. Crim. App. 1994) (a finding of intent to kill may be inferred from evidence of flight from the scene).

Viewing the direct and circumstantial evidence in the light most favorable to the verdict, a rational jury could find beyond a reasonable doubt that Appellant was

guilty of capital murder as a principal, party, or party-conspirator. Therefore, Appellant's first issue is without merit and should be overruled.

RESPONSE TO ISSUE TWO

The trial court acted within its discretion in denying's Appellant's request for a jury instruction on the lesser-included offense of robbery.

In his second issue, Appellant argues that the trial court erred by denying his request to submit the lesser-included offense of robbery in the jury charge. (*See* App. Br. at 21). This issue is without merit should be overruled.

Courts apply a two-pronged test to determine whether a defendant is entitled to an instruction on a lesser-included offense. *Cavazos v. State*, 382 S.W.3d 377, 382 (Tex. Crim. App. 2012) (citing to and relying on the *Aguilar/Rousseau* test); *see also Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993); *Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985). The first step is to determine whether an offense is actually a lesser-included offense of the alleged offense. *Hall v. State*, 225 S.W.3d 524, 535 (Tex. Crim. App. 2007). This determination is a question of law, and it does not depend on the evidence to be produced at the trial. *Id.* An offense is a lesser-included offense if established by proof of the same facts or less than all the facts required to establish the commission of the greater offense. Tex. Code Crim. Proc. Ann. art. 37.09(1). Because robbery is contained within the proof for murder in

the course of a robbery, Appellant has met the first prong. *See Solomon v. State*, 49 S.W.3d 356, 369 (Tex. Crim. App. 2001). However, he fails to meet the second prong.

Under the second step of the *Aguilar/Rousseau* test, the reviewing court considers whether there is some evidence that would permit a rational jury to find that, if the defendant is guilty, he is guilty only of the lesser offense. *Cavazos*, 382 S.W.3d at 382, 385. It is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense; rather, "there must be some evidence directly germane" to the lesser-included offense for the factfinder to consider before an instruction on that lesser-included offense is warranted. *Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997). Because appellant was charged with a conspiracy theory of liability for murder in the course of a robbery, the second prong is met only if there is evidence in the record showing either (1) there was no murder, (2) the murder was not committed in furtherance of a conspiracy, or (3) the murder should not have been anticipated. *Solomon*, 49 S.W.3d at 369.

The evidence showed that Appellant recruited his larger friend, Range, to assist him in committing the offense. After Appellant and Range entered Brian's hotel room, they hit and kicked Brian multiple times and, after Brian lost consciousness, laid him face-down on the bed in a pool of his own blood. Brian died as a result of asphyxiation and the blunt-force injuries he sustained. After Appellant and Range had tossed the room, the men did not check on Brian to see if he needed medical

attention. Rather, they ripped the hotel phone cord from the wall and took Brian's cell phone to ensure that he could not call for help and would be left there to die.

Appellant's main argument is that only a robbery was planned and it was never his intent for anyone to get hurt. However, whether Appellant intended to kill the victim before the robbery took place is irrelevant if the relevant liability elements were established at the time the crime was committed. *See Rousseau*, 855 S.W.2d at 674 (the possibility that initially or at some point during the commission of the robbery the offender did not have an intent to cause death does not amount to evidence that the offender did not intend to cause the victim's death when the murder was committed). There is no dispute that Brian Sample was killed. There is no evidence that Brian's death was not in furtherance of a conspiracy to commit robbery. *See Solomon*, 49 S.W.3d at 369. Moreover, there is no evidence that Brian's death was not anticipated, much less any evidence that the death should not have been anticipated. *Id.* As such, Appellant was not entitled to an instruction on the lesser-included offense of robbery. Appellant's second issue should be overruled.

RESPONSE TO ISSUES THREE AND FOUR

The trial court properly overruled Appellant's motion for mistrial and objection during the State's closing argument.

In his third and fourth issues, Appellant contends that the trial court erred by denying his motion for mistrial to one portion of the State's closing argument, and by

overruling his objection to another portion of the State's closing argument. His claims are without merit.

Applicable Law

The purpose of closing argument is to facilitate the jury's proper analysis of the evidence presented at trial so that it may arrive at a just and reasonable conclusion based on the evidence alone and not on any fact not admitted into evidence. *Campbell v. State*, 610 S.W.2d 754, 756 (Tex. Crim. App. [Panel Op.] 1980). Proper jury argument generally falls within one of four areas: (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to an argument of opposing counsel, and (4) plea for law enforcement. *Freeman v. State*, 340 S.W.3d 717, 727 (Tex. Crim. App. 2011). Counsel is generally afforded wide latitude in drawing inferences from the record, as long as the inferences are reasonable and offered in good faith. *Coble v. State*, 871 S.W.2d 192, 205 (Tex. Crim. App. 1993) (en banc).

Even when an argument exceeds the permissible bounds of these approved areas, such will not constitute reversible error unless, in light of the record as a whole, the argument is extreme or manifestly improper, violative of a mandatory statute, or injects new facts harmful to the accused into the trial proceeding. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). The remarks must have been a willful and calculated effort on the part of the State to deprive appellant of a fair and impartial trial. *Id.* An instruction to disregard, which the jury is presumed to follow, will generally cure the improper argument. *Id.*

When a court sustains a defendant's trial objection but denies his motion for mistrial, that ruling is reviewed under an abuse-of-discretion standard. *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). A mistrial is an appropriate remedy in extreme circumstances for a narrow class of highly prejudicial and incurable errors. *Hawkins*, 135 S.W.3d at 77; *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000). A mistrial should only halt trial proceedings when an error is so prejudicial that continuing the trial would be wasteful and futile because an impartial verdict cannot be reached or a conviction would have to be reversed on appeal due to obvious error. *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). The particular facts of the case determine whether an error requires a mistrial. *Id.*

The Trial Court Properly Denied Appellant's Motion for Mistrial

Appellant contends in his third issue that the trial court erred in denying his motion for mistrial after the State argued in closing that "[i]t is absolute[ly] foreseeable that any robbery is gonna result in murder." (*See* Appellant's Br. at 27). The record reflects that the complained-of argument was as follows:

> MS. GRONA-ROBB: …With these videos, we can almost pinpoint how this plan develops because we see him at noon in his regular clothes. In his white T-shirt. With nothing covering his head. And his slides.
>
> Well, guess what, when you're going to rob someone, you can't wear your slides. Why not? Because robbery is dangerous. Robbery means I think what I want is more important than what this other person thinks belongs to them, and I'm gonna ignore whether they worked for it or however they got it, the suffering that they might have gone through to obtain it. I want it so I don't care about this person. I'm

> going to get it. And I am putting my needs ahead of anyone else's. It is absolute[ly] foreseeable that any robbery is gonna result in murder.
>
> MR. ALLEN: I'll object to that's totally improper and that's outside the record.
>
> THE COURT: Sustained.
>
> MR. ALLEN: As[k] the jury be instructed to disregard that.
>
> THE COURT: Jury, you've been instructed.
>
> MR. ALLEN: I move for a mistrial.
>
> THE COURT: Denied.

(RR10: 284-85).

One of the theories asserted by the State during trial was that Appellant was guilty as a party to the offense because Brian was killed in furtherance of the conspiracy to commit robbery and that his death was anticipated, or should have been anticipated. During this portion of her argument, the prosecutor was highlighting the evidence, and reasonable deductions therefrom, that supported this theory. As such, this argument was not improper.

In any event, the trial court sustained Appellant's objection and instructed the jury to disregard. The trial court's prompt instruction cured any error. *See Hawkins*, 135 S.W.3d at 84 (an instruction to disregard will in most cases be considered effective to cure the harm from an improper argument). Under the circumstances, the trial court was reasonable in believing that its instruction to disregard was effective and that Appellant suffered no prejudice from the prosecutor's remark. *See id.* at 77 (a

mistrial is an appropriate remedy *only* in extreme circumstances for a narrow class of highly prejudicial and incurable errors) (emphasis added). Therefore, the trial court did not err in denying appellant's motion for mistrial.

The Trial Court Properly Overruled Appellant's Objection

Appellant contends in his fourth issue that the trial court reversibly erred in overruling his objection to the State's closing-argument claim that "[t]he evidence is clear to assume that one person couldn't have done this." (*See* Appellant's Br. at 30). The complained-of argument was as follows:

> MS. GRONA-ROBB: Brian Sample was left to die. He's not untied when they leave. No one calls for help. The phone is unplugged, so maybe -- maybe no one can call. Maybe the girl in there, Jessica, the 22-year-old who is terrified about what's going on, might try to call for help. But maybe not if the cord's disconnected. Maybe she won't make that call. Maybe no one will make that call.
>
> And then Brian Sample lies there, not because he was placed there accidentally but because he was beat to death and left to drown, to suffocate in his own blood.
>
> What kind of man does that?
>
> What kind of man organizes a plan knowing that he's gonna bring the strongest guy he knows?
>
> What kind of man brings in Rodney? Anthony George did.
>
> This isn't mere presence. He's changing clothes. He's making a plan. He's directing, aiding, and encouraging this plan.
>
> This happened in 17 minutes. I get to speak to you for 15. So approximately the amount of time I'm talking to you is how long it took for them to kill Brian Sample.

> The last he was seen is getting in the elevator. 17 minutes. Not done by one person. The evidence is clear to assume that one person couldn't have done this. It is –
>
> MR. ALLEN: Object to the misstatement of the evidence.
>
> THE COURT: Overruled.
>
> MS. GRONA-ROBB: That it makes no sense that one person would have done this while the other --the one who brought him in, the one who solicited and encouraged him to come help would just sit by.

(RR10: 289-90).

This was an appropriate summation or deduction from the evidence. The defense attempted to argue that Appellant was merely present and that Range was the only one who used force against the victim during the course of the offense. The prosecutor was merely highlighting some of the evidence to the contrary – that Appellant was the one who meticulously planned the offense and directed the other participants in their execution of the conspiracy to commit robbery – to show it was a reasonable deduction that Appellant did not merely sit by and do nothing. This was proper summation and deduction evidence and, therefore, the trial court properly overruled Appellant's objection.

Error, If Any, Was Harmless

Appellant has failed to show error in either of the complained-of closing arguments. However, even if this Court were to find that any of the foregoing arguments were improper, any error was harmless.

Improper argument is non-constitutional error, and a non-constitutional error that does not affect substantial rights must be disregarded. *Brown v. State*, 270 S.W.3d 564, 572 (Tex. Crim. App. 2008); Tex. R. App. P. 44.2(b). To determine whether an appellant's substantial rights were affected, an appellate court balances three factors: (1) the severity of the misconduct (i.e., the prejudicial effect), (2) any curative measures, and (3) the certainty of conviction absent the misconduct. *See Brown*, 270 S.W.3d at 572-73. In evaluating the severity of the misconduct, the reviewing court must assess whether the argument injected new and harmful facts or was, in light of the entire argument, extreme or manifestly unjust and willfully calculated to deprive appellant of a fair and impartial trial. *Id.* at 573.

Viewing the State's closing argument as a whole, the record does not show that there was a willful and calculated effort to deprive Appellant of a fair and impartial trial. The prosecutor's arguments were proper summations and reasonable deductions from the evidence presented at trial. It is clear from the context of each argument that the prosecutor did not have an improper motive. The arguments did not inject new facts into the proceeding and were not severe in light of the tenor of defense counsel's closing argument. In addition, when requested, the trial court gave a prompt curative instruction, which the jury is presumed to have followed. This was adequate to cure any error.

Moreover, there was more than sufficient evidence to prove Appellant's guilt. The security footage from the hotel, as well as the trial testimony, clearly identified

Appellant as one of the assailants and showed a common plan and design to commit the offense. Appellant's own girlfriend testified that, during the course of the robbery, Appellant participated in causing the blunt force and asphyxiation injuries that led to Brian's death. After Appellant had thoroughly searched Brian's belongings, he did not check to see if Brian needed medical assistance; rather, the he took all the phones from the room and left Brian, hog-tied on the bed, face-down in a pool of his own blood, to die. Appellant then attempted to conceal evidence by throwing Brian's cell phone in a sewer drain outside and fled the state to avoid apprehension. Based on the evidence presented, the jury most certainly would have convicted Appellant regardless of the prosecutor's statements. Thus, any error in the prosecutor's arguments did not affect appellant's substantial rights. *See Brown*, 270 S.W.3d at 572; Tex. R. App. P. 44.2(b). Based on the foregoing, Appellant's third and fourth issues should be overruled.

RESPONSE TO ISSUE FIVE

The State agrees that the judgment should be reformed to correct several errors identified by Appellant.

In his fifth issue, Appellant asks this court to modify the judgment to correct several inaccuracies therein. The State agrees that the judgment should be modified as outlined below.

An appellate court has the power to correct and modify the trial court's judgment to make the record speak the truth when it has the necessary data and

information to do so. *See* Tex. R. App. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27-28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529-30 (Tex. App.—Dallas 1991, pet. ref'd).

Here, the judgment reflects that Appellant was convicted of "CAPITAL MURDER TERRORIST THREAT." (CR: 140). However, the record reflects he was convicted of capital murder in the course of committing or attempting to commit robbery, as charged in the indictment. (CR: 18, 157; RR10: 296-97). The judgment also incorrectly lists Appellant's trial attorney as Daniel Esckstein. (CR: 140). However, the record reflects that Appellant's lead trial attorney was Scottie Allen and he was assisted by Lysette Rios.[2] (CR: 31, 100; RR7: 5). The judgment also incorrectly reflects that Appellant's punishment was assessed by the jury, whereas the record reflects that the mandatory sentence of life imprisonment without parole was assessed by the trial court. (RR10: 298-99).

The State agrees with Appellant's request for this Court to modify the judgment to correct these inaccuracies. *See* Tex. R. App. P. 43.2(b); *Bigley*, 865 S.W.2d at 27-28; *Asberry*, 813 S.W.2d at 529-30.

[2] Eric Reed also filed a letter of representation in this case and appeared for pretrial hearings, but subsequently withdrew before the commencement of the trial. (CR: 100, 114-117; RR2: 4, RR3: 4; RR4: 4).

STATE'S CROSS-POINT

The judgment should be modified to reflect a deadly weapon finding.

The indictment and jury charge alleged that Appellant caused the death of Brian Sample "by striking Brian Sample with a hand, or kicking Brian Sample, or suffocating Brian Sample with a pillow, or squeezing Brian Sample's neck with a hand or arm." (CR: 151). The jury found Appellant guilty of capital murder "as charged in the indictment." (CR: 157). Therefore, the jury made an affirmative deadly weapon finding. *See Polk v. State*, 693 S.W.2d 391, 394 (Tex. Crim. App. 1985); *Roots v. State*, 419 S.W.3d 719, 724 (Tex. App.—Fort Worth 2013, pet. ref'd). The judgment, however, contains the entry "N/A" in the "Findings on Deadly Weapon" field. (CR: 140).

As stated herein, this Court has the authority to modify an incorrect judgment when it has the necessary data and information to do so. *See* Tex. R. App. P. 43.2(b); *Bigley*, 865 S.W.2d at 27-28; *Asberry*, 813 S.W.2d at 529-30. Accordingly, the judgment should be modified to read "Yes" in the "Findings on Deadly Weapon" field of the judgment.

PRAYER

Appellant has suffered no reversible error. The State requests that this Court modify the trial court's judgment as outlined above and affirm the judgment as modified.

Respectfully submitted,

/s/ Jaclyn O'Connor Lambert

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 9,343 words according to Microsoft Word and complies with the word-count limit in the Texas Rules of Appellate Procedure. *See* Tex. R. App. P. 9.4(i)(2)(B).

/s/ Jaclyn O'Connor Lambert
JACLYN O'CONNOR LAMBERT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief was electronically served on Appellant's attorneys, Robert Udashen, rnu@udashenanton.com, and Brett Ordiway, brett@udashenanton.com, Udashen Anton, 2311 Cedar Springs Rd., Ste 250, Dallas, Texas 75201, on September 23, 2019.

/s/ Jaclyn O'Connor Lambert
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